Is There A Better Way Forward?

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The autocratic turn in Hungary and Poland should sound alarm bells all over the EU. While there are surely serious problems in a number of other Member States (the current inquiries into press freedom and corruption in Malta come to mind and the killing of the journalist in Slovakia also raises cause for concern), so far only Poland and Hungary have governments that are systematically undermining constitutional checks on the power of their leaders and deliberately turning all state institutions into arms of the party. Those cases demand that the EU's full powers be urgently directed to averting a full-blown autocracy within the EU.

What can be done? We have suggested that the EU try multiple strategies at the same time. First, we believe that invoking Article 7(1) in the cases of both Hungary and Poland is important for laying out the special significance of these two cases and for letting the democratic oppositions in these countries know that they have not been abandoned to autocrats. But even though Article 7(1) is a heavy lift for EU institutions given the supermajority requirements in the Parliament and in the Council that are required to pass it, Article 7(1) will not be enough as it only generates a warning with no actual "bite." Still, a warning matters.

Given that in both Hungary and Poland, actual breaches of the rule of law have occurred, so there is already more than enough evidence that EU institutions should move on to invoke Article 7(2) and (3), which would enable actual sanctions to attach. Most notably, a Member State so disciplined would lose its vote in EU decision-making, which would serve to quarantine dangerous influences to keep them out of EU decision-making. But of course, on its face, Article 7(2) requires unanimity and Hungary and Poland have each committed to blocking sanctions against the other. However, as we have previously argued, it would be a very odd legal provision that provided for maximal sanctions against a violating party if there is only one of them but became totally useless as soon as the number of violators reached two. The principle of effet utile should disqualify any Member State subject to an Article 7 procedure from voting on any other Member State that is also being potentially sanctioned. That said, unanimity even without each offender blocking the others' sanctions is hard to imagine given the party politics involved.

EU institutions are starting to realise that they need an alternative. Therefore serious discussion is starting about how to prevent EU cohesion funds from subsidizing Member States that fail to follow basic European values. Why should the EU send huge subsidies to Member States that are dedicated to destroying the basic principles on which the EU is built?

Originally suggested in the letter from four foreign ministers, led by Frans Timmermans when he was the foreign minister of the Netherlands, the idea that the Commission should find ways to freeze cohesion funds that would otherwise go to violating Member States has been gradually gaining acceptance. The original letter did not propose a legal avenue to get

to that result, but there are now several options under discussion.

First, as one of us has suggested, the Commission should become more creative in the way it brings its infringement actions so that they emphasise not just fly-specking acquis violations but point out broader patterns in the way that EU law is being undermined. The Commission can create a more general theory of these cases by showing that violations of the Charter of Fundamental Rights occur alongside acquis violations, or by bringing an action for failure of the Member State to engage in sincere cooperation under Article 4(3) TEU, or even by grounding an action in failure to uphold the values of Article 2 TEU directly. If the Court of Justice agrees with this assessment and finds a systemic infringement of EU law, then it should be possible, if the Member State does not comply in a systematic way with the Court's ruling, to cut EU funds by going back to the ECJ under Article 260 TFEU to seek a fine and then docking the outflow of cohesion funds by the amount that is owed by the national treasury of the offending state (see also the suggestions made recently by Professors Waelbroeck and Oliver here).

Alternatively, the European Commission is now discussing ways to build EU values conditionality into the next multi-year financial framework, as Commissioner Jourová indicated last October.

The German government – or at least the German government before the most recent election – agreed that this could be productive. But such conditionality is bound to be controversial and perhaps even litigated at the CJEU before it can take effect. Putting conditionality into place will take nerves of steel at the Commission.

Finally, the creation of the European Public Prosecutor in October 2017 has introduced another avenue through which cohesion funds could be docked if Member States refuse to follow the rules. While only 20 of the Member States have signed onto the Public Prosecutor's jurisdiction, not including Hungary or Poland, momentum is gaining to require all Member States that receive EU funds to join. While the European Public Prosecutor would operate through claw-backs of inappropriately spent money rather than through blocking the funds from being awarded in the first place, this would still be yet another way that the EU could punish rule of law violations by changing the amount of money that eventually flows to systemic violators of EU principles.

Other remedies against rule of law backsliding states are more legal and doctrinal. As we mentioned, the principle of mutual trust requires Member States to enforce each other's legal judgments, but if the "good" Member States can no longer trust the courts in the autocratic Member States, then this principle will start to crumble. Already the Court of Justice has made an exception to the principle of mutual trust by saying that European Arrest Warrants did not have to be automatically recognised when they involved sending people back to either Hungary or Romania, whose prisons have been found to be in violation of the prohibition of inhuman treatment under the European Convention on Human Rights. If the courts of Hungary and Poland show more signs of political influence, it is even conceivable that the Court of Justice will find that they are not "courts" for the purposes of EU law, which would in turn mean that the other Member States would not have to recognise their judgments.

A recent Grand Chamber judgment of the Court of Justice is particularly noteworthy in this respect as it suggests (to the best of our understanding) that the EU principle of judicial independence may be relied upon against Member States in any situation where the relevant national measure concerns a "field" covered by EU law (which is the wording of Article 19 TEU) irrespective of whether the relevant national measures implements EU law (which is what Article 51 of the EU Charter requires for it to be applicable):

> 32. Article 19 TEU, which gives concrete expression to the value of the rule of law stated in Article 2 TEU, entrusts the responsibility for ensuring judicial review in the EU legal order not only to the Court of Justice but also to national courts and tribunals …
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> …
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> 36. The very existence of effective judicial review designed to ensure compliance with EU law is of the essence of the rule of law …
> 37. It follows that every Member State must ensure that the bodies which, as 'courts or tribunals' within the meaning of EU law, come within its judicial system in the fields covered by that law, meet the requirements of effective judicial protection.

As noted by Michal Ovádek, this judgment "strengthens the Commission's case in the ongoing dialogue with Poland". Looking beyond Poland, the Court of Justice appears to have just made it possible to challenge any national measure which affects national courts and which may infringe judicial independence on the sole basis of Article 19(1) TEU ("Member States shall provide remedies sufficient to ensure effective legal protection in the fields covered by Union law") in any situation where the affected national courts have jurisdiction to hear cases based on EU law, that is, virtually all national courts.

If the Court of Justice finds that the judiciaries in Hungary and Poland can no longer be considered to be judicially independent, that is, politically neutral, it would mean that EU law would no longer apply in a uniform way across all Member States. That is why, in our view, all EU institutions must give this problem their most serious attention.

Europe has been through many crises over the last decade, but the rule of law problem is in many ways more insidious than the others. The rule of law crisis *will eventually destroy the EU from within* unless all European institutions do what they can to prevent the rule of law backsliders from further undermining the rule of law as a fundamental principle of the European Union.

SUGGESTED CITATION Scheppele, Kim Lane; Pech, Laurent: *Is There A Better Way Forward?, VerfBlog,* 2018/3/10, https://verfassungsblog.de/is-there-a-better-way-forward/, DOI: https://dx.doi.org/10.17176/20180309-111841.